RE LIM BENG; EX P ERIC LAU MAN HING

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID JC
[BANKRUPTCY NO: D3-29-3678-99]
5 NOVEMBER 2003

BANKRUPTCY: *Notice - Creditor's petition - Legality - Notice and petition premised upon vague order of court - Whether notice invalid - Petition founded on such notice - Whether must necessarily fail - Whether uncertainty must be corrected before bankruptcy proceedings could be instituted*

This was an appeal by the judgment creditor ('JC') against the decision of the learned Senior Assistant Registrar setting aside his bankruptcy notice and creditor's petition on the ground that the same were premised upon a court order whose terms were ambiguous and uncertain. Before the learned judge, the JC *inter alia* argued that the SAR ought to have dismissed the judgment debtor's application to set aside, as the judgment debtor ('JD') could not in law challenge the court order or go behind the judgment in question.

Held (dismissing the appeal):

[1] It is settled law that the court in the exercise of its bankruptcy jurisdiction should not go behind the judgment unless there was fraud, collusion or miscarriage of justice. However, having seen the order upon which the bankruptcy proceedings were premised, it was clear that there was uncertainty in the terms of the said order of court. (p 702 f-g)

[2] What was disputed by the JD did not tantamount to going behind the judgment. The judgment per se was ambiguous as to its terms against the judgment debtor. The term "atau gantirugi yang akan diakses" in the order had created uncertainty or ambiguity in the execution of the same. The JC in the circumstances ought to apply to the court making the order to correct the uncertainty, and until that was done, no bankruptcy proceedings ought to be commenced against the JD. (pp 702 g-h & 703 a)

Case(s) referred to:

Chong Sew Jin Re ex p Borneo Housing Mortgage Finance Bhd [1991] 3 CLJ 2470; [1991] 2 CLJ (Rep) 438 HC ***(refd)***

Goh Wui Lee, ex p Standard Chartered Bank [1991] 1 CLJ 170; [1991] 2 CLJ (Rep) 653 HC ***(refd)***

Government of Malaysia v. Mathew Chan Theng Kiang [1995] 2 CLJ 125 HC ***(refd)***

MSA Zachariah Exp Boon Siew Finance Bhd [1993] 3 CLJ 279 HC ***(refd)***

Re Tioh Ngee Heng, ex p Yap Kin Lian [2000] 1 LNS 197 ***(refd)***
Tosrin Jarvanthi, ex p Equity Finance Corp Bhd [1989] 2 CLJ 587 HC ***(refd)***
Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 MLJ 304 ***(refd)***
Tan Sin Moh v. Label Ltd [1988] 2 MLJ 51 SC ***(refd)***

For the judgment debtor - Shakir Hussin; M/s Mohamed Noor Don & Assocs
For the judgment creditor- Trevor Jason Mark Padasian; M/s Skrine & Co

Reported by Rusnah Aziz

JUDGMENT

Abdul Wahab Said JC:
This is an appeal by the judgment creditor against the Order of the learned Senior Assistant Registrar granting the judgment debtor's application in encl. 25 to set aside both the bankruptcy notice and the creditor's petition.

By encl. 25 the judgment debtor raised the following issues to set aside the bankruptcy notice and the creditor's petition.

1) Service of petition was irregular because it was not posted at the judgment debtor's address, and

2) The bankruptcy notice did not comply with the Order of the court dated 26 June 1997.

In considering the first issue, the court is satisfied that attempts had been made and the judgment debtor had been evading service. I hold that whether the judgment debtor is aware of the creditor's petition is irrelevant. Notwithstanding the affidavit filed by the judgment creditor's wife and servant who are interested deponents of which I have to treat with great caution, I am satisfied that the substituted service of the creditor's petition was properly served. I accept the affidavit for substituted service to have been properly effected by the process server. The main thrust of the judgment debtor's application is the second issue i.e. that the bankruptcy notice and creditor's petition are premised on the Order of High Court dated 26 June 1997 which terms are ambiguous and uncertain.

The learned counsel for the judgment creditor submitted that by contending that the terms of the order is ambiguous and uncertain, the judgment debtor is in substance contending that the order is tainted with irregularity or formal defect. This he further submits tantamount to challenging the Order dated 26 June 1997 in the course of the bankruptcy proceedings and inviting the court to go behind the judgment which is prohibited by *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 MLJ 304.

Learned counsel for judgment creditor then proceeded to illustrate the authorities where the judgment debtor had been prevented from going behind the judgment.

In *Tan Sin Moh v. Label Ltd* [1988] 2 MLJ 51 Wan Sulaiman SCJ held that the judge was correct in not finding any evidence of fraud, collusion or miscarriage of justice and in refusing to apply his discretion to go behind the decision in the civil suit and enquire into the validity of the judgment debt. Further in *Re Tosrin Jarvanthi, Ex p Equity Finance Corp Bhd* [1989] 2 CLJ 587 the judgment debtor wanted the court to go behind the judgment on the ground that the letter of demand sent to borrowers with copies to guarantors does not constitute a proper notice to guarantor. LC Vohrah J held that in the absence of fraud, collusion or miscarriage of justice, the validity of the final judgment could not be enquired.

Learned counsel further cited *Re Chong Sew Jin Re ex p, Borneo Housing Mortgage Finance* [1991] 3 CLJ 2470; [1991] 2 CLJ (Rep) 438 where the court again reiterated that it could not go behind the judgment citing *Sovereign General (supra).* Likewise in *Re Goh Wui Lee, ex p, Standard Chartered Bank* [1991] 1 CLJ 170; [1991] 2 CLJ (Rep) 653 Haidar Mohd Noor J (as he was then) citing Sovereign General *(supra)* said there was no sufficient reason to go behind the judgment which the judgment debtor alleged was entered for sum larger than what was owed.

The bankruptcy court had consistently rejected challenges on judgment ie, the charging of interest upon interest and that the judgment is under appeal (*Re MSA Zachariah, ex p Boon Siew Finance Bhd* [1993] 3 CLJ 279), that the amount in the judgment is in excess of the judgment debtor's actual indebtedness having paid a certain sum of money to judgment creditor after judgment (*Government of Malaysia v. Mathew Chan Theng Kiang* [1995] 2 CLJ 125).

In bankruptcy proceedings, the court hearing an application to set aside the bankruptcy notice or petition cannot go behind the judgment. A petitioning creditor ought to be entitled to use the judgment to found bankruptcy proceedings. A judgment even though irregular is valid and enforceable until it is set aside.

Steve Shim J (as he was then) in *Re Tioh Ngee Heng Exp. Yap Kin Lian @ Norhashimah Yap (Administrative of the Estate of Mohamad Shariff bin Haji Hussain* [2000] 1 LNS 197 succinctly states as follows:

> ... The Court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc. In *Isaacs v. Robertson* [1985] AC 97, Lord Diplock speaking for the Privy Counsil approved the proposition advanced by Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567 who said at p. 569:

It is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Conttenham, LC, said in *Chuck v Cremer* [1846] 1 Coop temp Cott 338 at p 342, 47 ER 884 at p 885): A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or theirs solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.' Such being the nature of this obligation, two consequences will, in general, follow from this breach. The first is that anyone who disobeys and order of the court is in contempt and may be punished by committal or attachment or otherwise. This principle has been followed by our Supreme Court in *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 MLJ 304.

In his application in encl. 25 judgment debtor contended that the term of the order against him which is under appeal is uncertain and ambiguous. For the sake of clarity the order of the court is reproduced in extensor as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
PETISYEN PEMULA NO. D1-26-26-1996

Dalam perkara mengenai Eramara Jaya Sdn. Bhd.; Dan
Dalam perkara mengenai Seksyen 181 Akta Syarikat 1965; Dan
Dalam perkara mengenai Aturan 88 dari Kaedah-Kaedah Mahkamah Tinggi 1980

ANTARA

Eric Lau Man Hing ... Pempetisyen

DAN

1. Eramara Jaya Sdn. Bhd.
2. Eu Foong Hin ... Responden
3. Lim Beng ... Responden

PERINTAH

ATAS PERMOHONAN pihak Pempetisyen yang dinamakan di atas **DAN SETELAH MEMBACA** Petisyen bertarikh 30hb. Oktober 1996, Afidavit Eric Lau Man Hing yang diikrarkan pada 25hb Oktober 1996, Afidavit-Afidavit Lim Beng yang masing-masingnya diikrarkan pada 26hb Mac 1997 dan 17hb April 1997, Afidavit-Afidavit Lim Koon Huan yang masing-masingnya diikrarkan pada 7hb April 1997 dan 23hb April 1997 dan kesemuanya difailkan di sini **DAN SETELAH MENDENGAR** Encik Wong Chong Wah (Cik Lim Koon Huan bersamanya) peguam bagi pihak Pempetisyen dan Encik Surinder Singh peguam bagi pihak Responden-Responden **ADALAH DIPERINTAHKAN BAHAWA** kedua-dua peguam memfailkan hujahan bertulis dan tindakan ini ditetapkan untuk keputusan pada 26hb Jun 1997 **DAN TINDAKAN INI** dipanggil untuk keputusan pada hari ini dalam kehadiran Encik Wong Chong Wah (Cik Lim Koon Huan bersamanya) peguam bagi pihak Pempetisyen dan Encik Surinder Singh peguam bagi pihak Responden-Responden **ADALAH DIPERINTAHKAN BAHAWA**:

(a) Responden Kedua dan Ketiga hendaklah diperintahkan untuk membeli 30% pemegangan saham Pempetisyen dalam Syarikat dengan harga RM3,514,527.15;

(b) Responden Kedua dan Ketiga hendaklah diperintah untuk membayar kepada Pempetisyen jumlah sebanyak RM3,514,527.15 atau **gantirugi yang akan diakses dengan faedah pada kadar 8% setahun atau pada suatu kadar** yang Mahkamah Mulia ini disifatkan adil sehingga tarikh pembayaran penuh;

(c) Resonden Pertama diperintah membayar Pempetisyen jumlah sebanyak RM1,595,300.000;

(d) Responden Ketiga hendaklah, dalam masa 7 hari, dari Perintah Mahkamah Mulia ini memberikan akaun lengkap dan pendedahan dan Syarikat yang dipegang dalam RDT yang didaftarkan atas nama Responden Ketiga dan pihak ketiga lain;

(e) Responden Kedua dan Ketiga hendaklah, dalam masa 7 hari dari Perintah Mahkamah Mulia ini memberi akaun lengkap dan pendedahan transaksi kewangan Syarikat dari 15hb September 1990 hingga ke tarikh Perintah Mahkamah Mulia ini;

(f) Kos permohonan ini hendaklah dibayar kepada Pempetisyen oleh Responden Kedua dan Ketiga; dan

(g) Kedua-dua pihak diberi kebebasan untuk memohon.

Bertarikh pada 26 haribulan Jun, 1997.

t.t.

Penolong Kanan Pendaftar
Mahkamah Tinggi, Kuala Lumpur

The bankruptcy notice dated 30 September 1999 in its particulars of claim appended the followings:

PARTICULARS OF CLAIM

(1) Principal Sum as per Order Dated 26th day of June 1997 in the Kuala Lumpur High Court Originating Petition No: Dl-26-26-1996 RM3,514,527.15

(2) Interest on RM3,514,527.15 at the rate of 18% per annum from 26/06/97 to 30/09/99 (827 days) RM 637.044.15

RM 4,151,571.30

Learned counsel for judgment debtor whilst contending the uncertainty of the order further raised the point that interest at 8% is not provided in the judgment. The rate of 8% or any rate as the Honourable Court deems fit until full settlement was for the damages to be assessed. Learned counsel referred to the case of *Low Mun v. Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 where Mohd Azmi FJ held that the non compliance with the terms of the judgment renders the bankruptcy notice invalid and failure to comply with such notice is not an act of bankruptcy and a bankruptcy petition founded on it must necessarily fail.

As observed earlier it is settled law that this court in the exercise of its bankruptcy jurisdiction should not go behind the judgment unless there is fraud, collusion or miscarriage of justice. However having seen the order upon which this bankruptcy proceedings are premised as reproduced earlier, I am satisfied there is uncertainty in the terms of the order of the court. What is disputed by judgment debtor in this circumstance does not tantamount to going behind the judgment. The judgment *per se* is ambiguous as to its terms against the judgment debtor. The term "atau gantirugi yang akan diakses" has created uncertainty or ambiguity in the execution of the order by the inclusion of the alternative. Having found the ambiguity in the terms of the order, I find that it is the judgment creditor's responsibility to apply to the court making the order to correct the uncertainty. In his submission, learned counsel for judgment creditor informed the court that he had made an application before the court that made the order to delete the words "atau gantirugi yang akan diakses" and "atau pada suatu kadar yang mahkamah yang mulia ini sifatkan adil".

Admittedly, judgment creditor counsel's application showed that there was this ambiguity that needs to be corrected and they had taken necessary step to do so. Until this correction or deletion is done, judgment creditor should not commence bankruptcy proceedings.

I am satisfied that the ambiguity in the order is substantive because of uncertainty for judgment debtor to either pay RM3,514,527.15 or damages to be assessed let alone the issue of interest and the connectivity between term (a) and (b) of the judgment.

For the above reasons I dismissed the judgment creditor's appeal in encl. 29 with costs.